

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD LEE POLLARD,

Defendant.

NO. CR-95-145-RHW

**ORDER DENYING MOTION
SEEKING RELIEF PURSUANT
TO 28 U.S.C. § 2255 FOR LACK
OF JURISDICTION**

Before the Court is Petitioner's Motion for Writ of Audita Querela (Ct. Rec. 227) and Motion for Appointment of Counsel (Ct. Rec. 226). On April 15, 1996, Mr. Pollard was sentenced to 240 months imprisonment after a jury found him guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5861(d), 5871, conspiracy to possess methamphetamine with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 846, and possession of methamphetamine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

In the motion *sub judice*, Mr. Pollard contends that the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005) renders his Judgment infirm. Although Mr. Pollard characterizes his motion as a Writ for Audita Querela, "a federal prisoner may not challenge a conviction or sentence by way of a petition for a writ of audita querela when that challenge is cognizable under

1 § 2255." *United States v. Valdez-Pacheco*, 237 F.3d 1007, 1080 (9th Cir. 2001) (a
2 prisoner may not circumvent the rules regarding successive § 2255 petitions by
3 filing his motion as a common law writ). The relief sought is cognizable under
4 § 2255 motion because Mr. Pollard's challenge goes to the legality of his sentence.
5 *See, generally, United States v. Wilcox*, 640 F.2d 970 (9th Cir. 1981). The record
6 reflects that Mr. Pollard already has filed two § 2255 motions; accordingly, the
7 Court lacks the authority to review Mr. Pollard's petition without authorization
8 from the Ninth Circuit Court of Appeals. 28 U.S.C. § 2255; 28 U.S.C.
9 § 2244(b)(3)(A); *United States v. Allen*, 157 F.3d 661, 664 (9th Cir. 1998). The
10 Court is not required to give Mr. Pollard notice that it is characterizing his petition
11 as a § 2255 Motion because this is not his first § 2255 petition. *See Castro v.*
12 *United States*, 540 U.S. 375 (2003).

13 The Anti-Terrorism and Effective Death Penalty Act of 1996 [AEDPA]
14 amended the federal habeas statutes and added the requirement that any prisoner
15 seeking to file a successive habeas application must first file, in the appropriate
16 court of appeals, a motion for an order authorizing the district court to consider the
17 successive application. 28 U.S.C. § 2244(b)(3)(A). Once the prisoner files such a
18 motion, the court of appeals then reviews the successive application to determine
19 whether the prisoner has made a prima facie showing that the new claim is (1)
20 based on the discovery of new, material evidence, or (2) based on a new rule of
21 constitutional law made retroactive by the United States Supreme Court. 28 U.S.C.
22 § 2255; *Allen*, 158 F.3d at 664. The record shows that Mr. Pollard did not obtain
23 the required authorization from the Ninth Circuit. Therefore, this Court does not
24 have jurisdiction to consider this application for relief.

25 The Court next considers whether the interests of justice warrant transferring
26 this case "to any such other court in which the action or appeal could have been
27 brought at the time it was filed" 28 U.S.C. § 1631. The transfer of civil
28 actions among federal courts to cure jurisdictional defects, as described in 28

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1 U.S.C. § 1631, applies to habeas corpus proceedings, and federal courts should
2 consider transfer without motion by the parties. *Cruz-Aguilera v. Immigration &*
3 *Naturalization Serv.*, 245 F.3d 1070, 1074 (9th Cir. 2001). The Ninth Circuit has
4 held that the interests of justice normally warrant transfer of a case rather than
5 dismissal. *Baeta v. Sonchik*, 273 F.3d 1261, 1264 (9th Cir. 2001). A transfer also
6 assists litigants who might be confused about the proper forum for review and
7 avoids the "time-consuming and justice-defeating" effect of requiring a case to be
8 filed elsewhere. *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990).
9 Transferring Mr. Pollard's Motion would expedite a just result in his case.
10 Accordingly,

11 **IT IS ORDERED** that:

12 1. The Court **CONSTRUES** Mr. Pollard's Motion for Writ of Error
13 Audita Querela Under the All-Writs Act (Ct. Rec. 227), filed April 11, 2005, as a
14 motion under 28 U.S.C. § 2255 and the District Court Executive shall re-file Mr.
15 Pollard's Motion as a § 2255 motion.

16 2. Mr. Pollard's motion shall be **TRANSFERRED** to the Ninth Circuit
17 Court of Appeals for determination of whether his motion should be authorized
18 pursuant to 28 U.S.C. § 2244(b)(3).

19 3. Mr. Pollard's Motion for Appointment of Counsel (Ct. Rec. 226) is
20 **DENIED AS MOOT**.

21 The District Court Executive is directed to file this Order, send a copy to Mr.
22 Pollard and to the Government, and forward this file, with a copy of this Order, to
23 the clerk of the Ninth Circuit Court of Appeals.

24 **DATED** this 22nd day of April, 2005.

25
26 s/ ROBERT H. WHALEY
27 United States District Judge
28

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